

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

**FEBRUARY 28, 2002
MORNING PAPER
(9:00 A.M. TO 12:00 NOON)
QUESTIONS**

ESSAY SECTION

1. Silas had a daughter, Patsy, and a son, Junior. Junior had a son, Simon. Patsy had a daughter, Priscilla.

Silas, who had neither experience nor interest in business matters, lived on the funds he inherited, which were managed for him by the family lawyer. When the family lawyer died, Silas selected Lawyer from advertisements in the telephone book yellow pages. He wanted to create trusts for some of his property and keep the rest until he died. He instructed Lawyer as to which properties to put into trusts and who were to be the income and remainderman beneficiaries for each trust. Lawyer drew up three inter-vivos trusts, based upon models in a form book. He mailed them to Silas, along with a form-book will which left all of Silas's substantial assets to his daughter, Patsy. The trusts and the will were then duly executed by Silas.

In each trust, the trustees were given power to retain or sell and reinvest the trust assets. Each trust stated: "Each trustee shall be liable only for willful misconduct or omissions in bad faith." Lawyer and Simon were co-trustees.

Trust A provided that Silas' daughter, Patsy, then 30 years old, was the beneficiary for her life and Simon was the remainderman. Silas transferred to the trust the corner grocery store founded by Silas' father, in which Patsy worked and which generated the modest income on which she supported herself.

When Silas died, one year after the execution of the trusts and will, Simon prevailed upon Lawyer to sell the store at a fair market price and invest the proceeds in Old Faithful, a reputable mutual fund which produced dividends which were less than Patsy's modest income

but had a record of high annual growth. Lawyer received a broker's commission from the buyer of the store.

Trust B provided that Silas' son, Junior, who was then 45 years old, was the beneficiary for his life and Simon was the remainderman. Silas conveyed the family homestead to the trust. When Silas died, the trustees sold the mansion for its fair market value and invested the proceeds in Old Faithful.

Trust C provided that Patsy's daughter, Priscilla, then age ten, was the beneficiary for eight years, and Simon was the remainderman. Silas transferred to the trust a 20-year mortgage note for \$100,000, with 15% annual interest, which Silas owned. Upon Silas' death, Simon told Lawyer that he had heard that the security for the mortgage note was questionable. The trustees then sold the mortgage note for its then market value and invested the proceeds in Old Faithful.

What are the rights of Patsy, Junior and Priscilla?

2. Comppart, Inc., was in the business of selling “aftermarket” computer parts under its own brand name. Comppart bought the parts from several manufacturers and then sold them at retail at its numerous outlet stores. Because Comppart wanted uniformity of packaging, it required the manufacturers to purchase the packaging for the parts from Big-Pak Corp. Comppart gave Big-Pak specifications for the labeling and art work for the packages. From time to time, Comppart itself purchased the packaging from Big-Pak for direct catalogue sales to retail customers. Big-Pak billed Comppart for such packaging, and billed the various manufacturers separately.

By 2000, consumer demand for Comppart products had grown substantially. The manufacturers were making greatly increased demands on Big-Pak for the packaging, with the result that Big-Pak’s regular, 30-day inventory was not enough to meet demand. Big-Pak’s chief salesperson called Comppart’s purchasing manager and said that Big-Pak would have to carry a 60-day inventory in order to keep up with demand. The purchasing manager told the salesperson, “Don’t worry, Comppart will cover payment for unsold inventory if it becomes obsolete.” Big-Pak accordingly stock-piled a 60-day inventory.

Shortly thereafter, Comppart hired a new purchasing manager who designed a completely new package for the products, entered into a written contract with Big-Pak’s chief competitor for the work, and told the manufacturers that they had to start using the new packaging immediately. At that time, several manufacturers, as well as Comppart itself, had outstanding invoices from Big-Pak for packaging materials already delivered. In addition, Big-Pak had a now obsolete 60-day inventory valued at about \$250,000.

Big-Pak has demanded that Comppart pay its outstanding invoice and pay for the unusable inventory and that the manufacturers pay the bills submitted to them.

What are the rights of the parties?

3. On May 1, 2001, Alison called Bert, her next-door neighbor and sales manager for Cindy's Painting, Inc. ("CPI") and told Bert that she would like to have her house painted by July 2, 2001, in time for her daughter's July wedding. Bert told Alison that CPI would do the job by July 1 for \$10,000, with \$5,000 down and the balance upon completion. Alison gave Bert her check for \$5,000, payable to CPI, which deposited it.

CPI's painters started the job in late May and by mid-June had painted about three-quarters of the house. On June 11, a violent rainstorm began, lasting for two days. On June 14, when the CPI workers had not returned to the job, Alison called Cindy, president of CPI, and learned from Cindy that the workers had unexpectedly quit to work for another company. Alison told Cindy that Bert had promised that the job would be done by July 1. Cindy denied that Bert was authorized to make any such promise, since he was "merely a salesman." Cindy said that CPI would not be able to return to finish the job until August and that Alison had to send the balance of \$5,000 immediately. Alison refused, hired a new painting company on June 20, to whom she paid \$8,000 to finish the job by July 2, which it did.

What are the rights of Alison and CPI?

4. In October, 2001, a bus traveling from Boston to Baltimore made a scheduled stop at the bus company's Newark terminal. With the bus driver's permission, three casually dressed police officers wearing their badges hanging around their necks boarded the bus. All carried guns in side holsters covered by either a jacket or shirt. Two of the officers went to the rear of the bus and began asking passengers where they were going and attempted to match passengers with overhead luggage; the third officer remained in the front of the bus, kneeling on the driver's seat and facing the passengers. No general announcements were made and the questioning officers either stood in the aisles or in empty rows behind the passengers. Placing his face about a foot from Ben, a seated passenger, one police officer said, "I'm Officer Jones. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on this bus. Do you have any bags?" Ben pointed to a small duffle in the overhead rack and gave Jones permission to look inside. Jones found no contraband but did find a copy of *Bomb Making for Dummies* and a small U.S atlas. Noticing that Ben was wearing a heavy coat on a warm day, Jones asked Ben if he, Jones, could do a pat-down search for weapons. Ben opened his jacket and Officer patted down Ben's jacket, his waist band and upper thighs. In both thigh areas, Jones felt hard objects that felt similar to drug packages he had found on other occasions. Jones arrested Ben and escorted him off the bus. A later search revealed that the "hard objects" were packets of U.S. currency taped to Ben's legs. In Ben's luggage, Jones found several box cutters, a small amount of cocaine and a foreign passport indicating that Ben was traveling on a student visa. Ben was charged with drug possession and held for trial by a military tribunal created by Presidential Order which stated in part:

To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals. The term "individual subject to this order" shall mean any individual who is not a U.S. citizen [and who] at the relevant times, (i) is or was a member of al Qaida; (ii) has...conspired to commit acts of international terrorism, or acts in preparation...that...threaten to cause...injury to or adverse effects on the U.S., its citizens, national security, foreign policy or economy. [An] individual subject to this order...shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought

on the individual's behalf, in (i) any court of the U.S. or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

You represent Ben. Your senior partner has decided to challenge both the underlying arrest and the military tribunal proceeding and has asked you to prepare a preliminary memo outlining possible strategies. What legal arguments will you suggest and why?

5. A and B were the sole stockholders of Consulting, Inc., a New York corporation. They met Z, a Massachusetts resident, and decided to form Internet, Inc., a Delaware corporation and executed a stock agreement setting forth the parties' rights and responsibilities. Z held 40% of the stock, A and B each held 30% of the stock. A and B agreed to perform certain start-up services for Internet for which they were paid \$150,000. Z agreed to provide \$250,000 of seed capital and wired those funds from his Massachusetts bank to Consulting in New York. A and B were paid equally for their work for Internet and the remaining funds from Z's initial \$250,000 investment in Internet were then deposited into Internet's sole bank account in New York. A, Internet's President and a New York resident, conducted all of Internet's business in New York except for two brief visits to Boston to meet potential investors in Internet and attendance at two trade shows in New Orleans and Chicago. Internet's business failed and Z sued A in Massachusetts federal court, naming Z and Internet as plaintiffs, alleging breach of contract and violations of Massachusetts General Laws, c.93A (c.93A). against A and demanding the return of Z's initial \$250,000 investment.

A. In a Memorandum filed by his counsel, Z asserted that an *ex parte* real estate attachment for \$750,000 was necessary because A took a large equity loan on his house and then sold the property and purchased commercial property with the proceeds and added that Z will prevail on his c.93A claim and be entitled to treble damages. The Verified Complaint did not contain these allegations. How should the Court rule on the *ex parte* attachment motion?

B. B, a New Jersey resident, moved to intervene in the lawsuit as a plaintiff, claiming that although A and B did have an agreement with Z that Consulting would perform certain services to assist in Internet's start-up activities, A failed to devote his full time and attention to Internet's business after the initial work was completed and B was financially harmed by A's conduct. Z objected to B's motion. How should the Court rule?

C. In responding to the complaint, A moved to dismiss, claiming that the court lacked subject matter jurisdiction. How should the Court rule?

D. Before the Court ruled on A's motion to dismiss, Z filed a motion to amend the complaint, dropping Internet as a party and adding a fraud count alleging, "A is a crook and a liar and he used the money Z sent to Consulting to pay himself for consulting services that he never performed and were not authorized." A objected to Z's motion to amend and also moved to dismiss Z's fraud count. How should the Court rule?

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

FEBRUARY 28, 2002
AFTERNOON PAPER
(2:00 P.M. TO 5:00 P.M.)
QUESTIONS

ESSAY SECTION

6. In 1970, Henry and Wilma, both of whom lived in state X, entered into an antenuptial agreement, with full disclosure by each of their net assets and income. The agreement was negotiated by counsel for each of them. It provided, inter alia, that upon a divorce, Henry would pay alimony of \$10,000 per year and transfer to Wilma assets worth \$50,000. At that time, Henry had net assets of \$100,000 and was earning \$20,000 per year. Wilma had neither assets nor income. Under the law of state X in 1970 and through the present, the antenuptial agreement was and is enforceable.

The parties were married shortly after executing the agreement and resided in state X for a month. They then moved to state Y where they lived for one year, during which time Henry bought an art works retail store which he gave to Wilma. The store is presently worth \$10,000 and generates approximately \$1,000 per year in income for Wilma. Wilma periodically visits the store.

At the end of their one year in state Y, the parties moved to Massachusetts where they have resided together with an upper middle class life style. Henry has acquired \$1 million worth of net assets and earns approximately \$200,000 in income each year.

Three months ago, Henry decided to end the marriage. He moved back to state Y where he procured a job, bought a house, registered to vote and intends to remain indefinitely. He filed for divorce in state Y and Wilma was served in Massachusetts by process in conformance with the long arm statute of state Y. She threw the process away. The Court in state Y granted Henry a divorce judgment which incorporated the terms of the antenuptial agreement.

Wilma has filed a complaint for divorce in Massachusetts, seeking support and a division of marital assets. By the use of procedurally appropriate pleadings, Henry seeks to defend on the following grounds:

1. The divorce judgment entered in state Y is binding.
2. Even if that judgment is not binding, the contract entered into in state X is valid and binding there and therefore must be enforced here.
3. In any event, under Massachusetts law the antenuptial agreement is an appropriate one and should be enforced here in accordance with its terms.
4. The appearance of Wilma's counsel should be stricken because he concedes that his written fee agreement with Wilma provides that his fee is \$25,000, due in advance, and that he guarantees she will receive an asset division of \$500,000.

What rulings should the Court make?

7. In 1989, Luke purchased Lot 1, a waterfront lot in a subdivision on Pleasure Lake in Massachusetts, and constructed a house on the western half of Lot 1. Also in 1989, Daniel purchased Lot 2 in the same subdivision, which was located directly behind Lot 1. Daniel constructed a one-story house on the eastern half of Lot 2 with a direct view of Pleasure Lake over the eastern half of Lot 1.

In January 1990, Luke and Daniel entered into a written agreement pursuant to which Daniel paid Luke \$5,000. The agreement provided that there shall not be built a house or other structure on the eastern half of Lot 1. The agreement further recited that "Daniel has derived much pleasure from the view of Pleasure Lake over Luke's land" and that the parties "intend to assure an unobstructed view of Pleasure Lake from Daniel's house." The agreement was never recorded.

In May 1995, a fire swept through Lot 2 and burned Daniel's house to the ground. Daniel did not rebuild his house.

In June 1997, Luke sold Lot 1 and his house to Cassie. Before committing herself to the purchase, Cassie had a conversation with Daniel in which Daniel told Cassie that Luke's Lot 1 was subject to a building restriction on the eastern side. Cassie asked Luke about the restriction and Luke said, "Don't worry about it. It won't be binding on you."

In August 2001, Daniel sold Lot 2 to Jess, telling her of the restriction on Lot 1 and handing her the original agreement signed by Luke and Daniel. While Jess was in Florida for the winter, Cassie started building a two-story residence on the eastern half of Lot 1. Upon learning of this fact, Jess consulted you.

Advise Jess as to her rights and remedies.

8. For several decades, Ashley operated a graphic design business in eastern Massachusetts under the title of "Creative Design Services" as a trade name properly registered under the governing state statutes, one of which provides as follows:

The Secretary of the Commonwealth shall investigate complaints of unlawful use of registered trade names and shall seek to restrain such unlawful use by injunctive relief.

Two years ago, Brianna began a similar business in central Massachusetts under the name of "Creative Design Specialists". Brianna expanded her activity into eastern Massachusetts and took work from Ashley's customers who thought that Brianna was a part of Ashley's business. Brianna did not advise any present or potential customers of her separate identity and ignored Ashley's letters demanding that she cease use of the "Creative Design" name.

Ashley sold her business to Tiffany, a young employee eager to expand its operations. A major itemized element of the sale price in the contract was the "good will and identity" of the business and the registered trade name. Ashley did not inform Tiffany of her problem with Brianna.

During her first year of ownership, Tiffany learned of the problem. Brianna's activities made further inroads upon Ashley's customers and blocked Tiffany's efforts to expand. Tiffany filed a complaint with the office of the Secretary of the Commonwealth of Massachusetts. Investigator, who was very busy, inquired into the complaint and conducted a superficial investigation, but failed to detect the facts relevant to Brianna's unlawful use of the registered trade name. Investigator reported that no violation had occurred.

Tiffany continued to lose business. She has consulted you.

1. What rights and remedies will you pursue for her?
2. What defenses do you anticipate?

9. Austin, Baker and Carter met at Austin's apartment where Austin told Baker and Carter of his plan to "stick up" Liquor Store the following day. Baker and Carter both agreed to take part in the plan. Later, after leaving Austin's apartment, Carter, who had just been released from prison and did not want to jeopardize his parole, decided not to participate and left town.

In accordance with the plan, the next day Baker stole a car and drove it to Austin's apartment, where Austin and Baker waited an hour for Carter, who never came. Austin and Baker then decided to carry out the plan by themselves and drove to Liquor Store. Baker waited in the car while Austin went into Liquor Store, armed with a sawed-off shotgun. Austin approached Clerk, an employee of Liquor Store, and pointing the shotgun at Clerk, demanded all of the money in the cash register. Clerk filled a bag with money and handed it to Austin. At that moment, Officer, a police officer who had seen Austin go into Liquor Store with the shotgun, entered Liquor Store with her revolver drawn. Austin turned toward Officer and fired a shot at her but missed. Officer then fired her revolver at Austin, missing him and instead striking and killing Clerk.

Austin charged toward Officer and hit her over the head with the butt of his shotgun, rendering her unconscious. He then ran out of Liquor Store, dropping the bag filled with money in his haste. Baker, who had seen Officer enter Liquor Store while waiting in the car, panicked and drove off without Austin. Unable to find Baker, Austin flagged down a passing car driven by Driver. He got into the car, pointed his shotgun at Driver, and ordered him to drive the car away at a high rate of speed. While driving, Driver hit and killed Pedestrian, who was crossing the street. Austin ordered Driver not to stop the car after striking Pedestrian and to continue driving to a remote wooded area outside of town. There, he tied up Driver, took his wallet, and then drove Driver's car back to town where he abandoned it in a vacant lot. Austin then went to his brother Edward's house for help. Edward let Austin hide in his basement until the following morning, when he gave Austin his car to escape.

What crimes have been committed, what defenses may be asserted, and by whom?

10. In August, 2001, First Bank was robbed by two armed and masked perpetrators. During the course of the robbery, Guard, a security guard employed by First Bank was shot and killed. Daffney, a former employee of First Bank, and Cody were both indicted for armed robbery while masked and murder. After their motions to sever the trials of their indictments were denied, Daffney and Cody were tried together before a jury in the Massachusetts Superior Court in December, 2001. Daffney testified in her own defense, while Cody declined to testify.

I. During the trial, the trial judge made the following evidentiary rulings. As to each ruling, was the trial judge correct?

A. Sally, Cody's ten-year-old daughter, was called as a witness by the Commonwealth. On direct examination, Sally testified over Cody's objection that while playing in the backyard of the home where she resided with Cody the day after the robbery, she found a mask and a moneybag labeled "First Bank" hidden behind a woodpile.

B. Officer, a police officer, was called as a witness by the Commonwealth. On direct examination, the Commonwealth offered Officer's police report, which was admitted in evidence over the objections of both Daffney and Cody. The report contained the following entry: "I arrived at First Bank and found Guard lying on the floor. Guard stated to me: 'I don't think I'm going to make it. It was Daffney who shot me. I'd know her voice anywhere.' Guard died moments later."

C. Whitney was called as a witness by the Commonwealth. On direct examination, Whitney testified over the objections of both Daffney and Cody that Cody had confided to her in October, 2001 that Daffney and he had robbed First Bank. In making this ruling, the trial judge instructed the jury that it was to consider this evidence on the question of Cody's guilt only and not that of Daffney.

D. On further direct examination, Whitney testified over Cody's objection that two weeks before the trial Cody had threatened to get even with her if she testified against him.

II. A. Assume that during the trial, the following occurred. Daffney was called as a witness in her own defense. On direct examination, Daffney denied participating in the crimes of which she was accused, testifying that she was out of town at the time of the robbery of First Bank. At a recess in the trial after her testimony, Daffney privately told her defense counsel, Lawyer, for the first time, that she in fact had committed the crimes.

What action, if any, should Lawyer take?

B. Assume instead that Daffney first told Lawyer of her participation in the crimes and of her intention to deny such participation one week prior to commencement of the trial.

What action, if any, should Lawyer take?